1980

Sharon H. Collier v. Rick L. Frerichs : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

SHARON H. COLLIER,	:	
Plaintiff-Appellant,	:	
vs.	:	Case No. 16906
RICK L. FRERICHS,	:	
Defendant-Respondent.	:	

BRIEF OF RESPONDENT

Appeal from the Judgment of the Fourth District Court Uintah County, The Honorable J. Robert Bullock, Judge

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BRIEF OF RESPONDENT

NATURE OF THE CASE

This personal injury action resulted from a collision between vehicles driven by the parties.

RELIEF SOUGHT ON APPEAL

Defendant seeks to have the judgment of the trial court affirmed.

STATEMENT OF FACTS

On February 9, 1976, at approximately 6:45 p.m., a vehicle driven by defendant, Rick Frerichs, struck the rear of a vehicle driven by plaintiff, Sharon Collier, on Vernal Avenue south of Vernal, Utah. (Tr. at 24) It was dark and there were no street lights. The road was snow packed and slippery. (Tr. at 25) However, prior to the accident defendant had no difficulty stopping his vehicle at stop signs. (Tr. at 89) His vehicle was under control. (Tr. at 85)

Just prior to the collision, plaintiff's vehicle had been stuck in the driveway of her home and her husband pulled her out onto Vernal Avenue with his vehicle. The plaintiff then proceeded north towards Vernal. Her husband stopped his vehicle in the southbound lane facing south and prepared to turn back into the driveway. (Tr. at 38 Plaintiff's Exhibit 10). The headlights of the vehicle being driven by plaintiff's husband were on. (Tr. at 92)

Rick Frerichs was proceeding north towards Vernal when he came upon the vehicle driven by plaintiff's husband. He was unable to observe the plaintiff's vehicle to the north of Mr. Collier's vehicle until after he had passed Mr. Collier because of the glare of Mr. Collier's headlights on his windshield. (Tr. at 83) As soon as he observed the plaintiff's vehicle he immediately took action to avoid a collision. (Tr. at 85)

The investigating officer estimated that Mrs. Collier had been traveling at 10 miles an hour when her vehicle was struck and that Mr. Frerichs was traveling at approximately 35 miles an hour prior to the collision and 20 miles an hour on impact. (Tr. at 31) The officer further stated that in his opinion the severity of the impact between the two vehicles was minimal. (Tr. at 33)

ARGUMENT

POINT I

PLAINTIFF IS PRECLUDED FROM ASSERTING TO THIS COURT THAT DEFENDANT WAS NEGLIGENT AS A MATTER OF LAW.

Plaintiff appears to assert that defendant was negligent as a matter of law and that this case should not have been submitted to the jury. (Appellant Brief at 3 and 5) Plaintiff did not except or object to any of the court's instructions nor to the failure of the court to give all of plaintiff's proposed instructions. (Tr. at 188) Plaintiff did not propose an instruction that defendant was negligent as a matter of law.

In addition, instruction No. 6 given by the court, stated, in pertinent part:

* * *

> Failure of the defendant to use ordinary and reasonable care in operation of his vehicle. . . would be negligence.

Thus, plaintiff cannot now claim as error that the issue of defendant's negligence was submitted to the jury, rather than ruled on by the court as a matter of law. Plaintiff did not preserve that issue for appeal. Maltby vs. Cox Construction Company, Inc., 598 P.2d 336 (Utah, 1979).

POINT II

THE JURY HAD FACTS BEFORE IT SUPPORTING ITS VERDICT IN FAVOR OF DEFENDANT.

Inasmuch as the jury found the facts in favor of the defendant, the evidence and all reasonable inferences that may be drawn from the evidence must be viewed in the light most favorable to sustain that verdict. Barlow Upholstery and Furniture Company vs. Emmel, 533 P.2d 900 (Utah, 1975) and Ewell & Son, Inc. vs. Salt Lake City Corporation, 27 U.2d 188, 493 P.2d 1283 (1972). This court should "review the evidence under the assumption that the jury believed those aspects of it which supported their verdict. Bullock vs. Ungricht, 538 P.2d 190 (Utah, 1975).

The critical facts supporting defendant's version of the accident are as follows: prior to the accident, defendant did not have trouble controlling or stopping his vehicle. The inference the jury could well have made was that the defendant reasonably believed he could stop his vehicle safety. However, defendant came upon the vehicle driven by plaintiff's husband. This obstacle and the glare from its headlights prevented defendant from seeing plaintiff's vehicle in time for him to avoid the collision.

The jury verdict based on these facts was not contrary to "common sense and experience."

POINT III

THE "LOOK, SEE AND HEED" RULE DOES NOT APPLY TO THE FACTS BEFORE THE COURT.

Plaintiff relies upon the so called "look, see and heed" rule first enunciated in Dalley vs. Mid-Western Dairy Products Company, 15 P.2d 309 (Utah, 1932). (Appellant Brief at 3 and 4) That rule states:

> It is negligence as a matter of law for a person to drive an automobile upon a travelled highway used by vehicles and pedestrians, at such a rate of speed that said automobile cannot be stopped within the distance at which the operator of said car is able to see objects upon the highway in front of him. Keller vs. Shelley, 551 P.2d 513 (Utah 1976).

This general rule has no aplication where the driver of a following vehicle takes action to avoid a vehicle in front of him immediately upon seeing that vehicle. Maltby at 340.

In both Dalley, supra, and Keller, supra, the driver of the following vehicle should have easily seen the vehicle in front of him in time to stop. The Dalley court specifically referred to the lack of any obstruction to the view of the driver of the following vehicle. 15 P.2d at 311. The Keller court noted that the area where the accident in that case occurred was straight and level, the road was dry, the weather was clear and the area was lighted. 551 P.2d at 514.

In both Dalley and Keller, the driver of the followin vehicle failed to see what he should have seen if he had been paying adequate attention.

Likewise, plaintiff's reliance on Henderson vs. Meyer 533 P.2d 290 (Utah, 1975) is misplaced since the facts of the accident there demonstrated that the driver of the following vehicle failed to see what should have been an obvious danger. The accident in that case occurred on a clear, dry day at noon, the roadway was straight, dry and level and there were no obstructions between the two vehicles to interfer with the vision of the following driver.

The defendant in the present case could not see plaintiff's vehicle because of the obstruction created by the vehicle being driven by plaintiff's husband and because of the glare from his headlights.

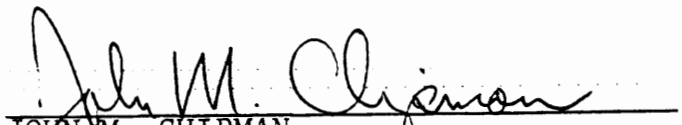
CONCLUSION

After having the advantage of observing the witnesses and hearing their testimony first hand, the jury in this case found that defendant was not negligent. The verdict was supported by the evidence that defendant had reason to believe he could stop his vehicle in a safe distance and that the obstruction created by the vehicle being driven by plaintiff's husband and the glare from that vehicle's headlights prevented the defendant from observing plaintiff's vehicle in time to safely stop.

Defendant respectfully submits that the judgment on the jury verdict should be affirmed.

DATED this 26th day of June, 1980.

HANSON, RUSSON, HANSON & DUNN



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MAILING CERTIFICATE

I hereby certify that I handed two true and correct copies of the foregoing Brief of Respondent to Glen M. Richman, Attorney for Plaintiff-Appellant, 79 South State Street, Suite 401, Salt Lake City, Utah 84111 this 26th day of June, 1980.